Supreme Court, U.S.
FILED

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No.

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In The

Supreme Court of the United States

October Term, 1996

THE STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LIMITED,

Petitioner,

vs.

VICTOR C. BARIS, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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17pp

QUESTION PRESENTED

Does a federal district judge, having dismissed a case filed by and against foreign litigants "with prejudice" on *forum non conveniens* grounds, have the jurisdiction and power to prevent the litigants from prosecuting the identical action in a state court?

PARTIES TO THE PROCEEDINGS

Plaintiffs-Respondents:

Victor C. Baris
Sivirino Carreon
Bulig-Bulig Kita Kamaganak Association
Renato Asistorga
Pedro B. Sorima
Arnel N. Galang
Elsa Montiagodo
Erasto Maghacut
Isabel Magno
Lorita Acosta Acebedo
Violeta Sabulao Faiyaz
Julieta Benaso
Ecolastica Baldo
Jose Baguhin

individually and on behalf of a purported class of all other persons similarly situated, including those persons identified by plaintiffs in Exhibit A, Record Volume 5, pp. 792-928.

Caltex Defendants-Respondents:

Caltex Petroleum Corporation[1]
Caltex Oil Corporation
Caltex (Philippines) Inc.

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1. Caltex Petroleum Corporation is fifty-percent owned by Chevron Corporation, and fifty-percent owned by Texaco, Inc.

Caltex Services (Philippines), Inc.

Caltex Services Corporation

American Overseas Petroleum Ltd.

Caltex Oil Corporation (Delaware)

Caltex (Asia) Ltd.

California Texas Oil Corporation

Steamship Defendant-Petitioner:

The Steamship Mutual Underwriting Association (Bermuda) Limited, a mutual insurance association of vessel owners.

Unserved Defendants Below:

Sulpicio Lines, Inc.

Caltex Philippines Petroleum Company, Inc.

Caltex International Limited

Caltex International Services Limited

Caltex Oceanic Limited

Caltex Oil Corp. (NY)

Caltex Oil Products

Caltex (Overseas) Limited

Caltex Trading and Transport Corporation

The Caltex Group

Caltraport (Far East) Company

Caltex Investment and Trading Limited

Caltex Services Corporation Limited

P T Caltex Pacific Indonesia

Vector Shipping Corporation

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceedings ii

Table of Contents iv

Table of Citations iv

Opinions Below 1

Statement of Jurisdiction 2

Statute Involved 2

Statement of the Case 3

Reasons for Granting the Writ 4

Conclusion 9

TABLE OF CITATIONS

Cases Cited:

American Dredging Co. v. Miller, 510 U.S. 443 (1994) 5, 6, 7, 8, 9

Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) 5, 6, 7, 9

Contents

	Page
Lauritzen v. Larsen, 345 U.S. 571 (1953)	8
Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)	8
Statutes Cited:	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1333(1)	3
28 U.S.C. § 1441(b)	3
28 U.S.C. § 2283	2
46 U.S.C. § 761	3
APPENDIX	
Appendix A — Opinion of the United States Court of Appeals for the Fifth Circuit Filed November 26, 1996	1a
Appendix B — Order of the United States District Court for the Southern District of Texas, Houston Division Entered June 15, 1990	3a
Appendix C — Opinion of the United States Court of Appeals for the Fifth Circuit Dated June 17, 1991 .	7a
Appendix D — Order of the United States District Court for the Southern District of Texas, Houston Division Entered March 5, 1992	33a

Contents

Page

Appendix E — Order of the United States Court of Appeals for the Fifth Circuit Filed December 9, 1992 ..... 40a

Appendix F — Order of the United States District Court for the Southern District of Texas, Houston Division Entered June 29, 1994 ..... 41a

Appendix G — Opinion of the United States Court of Appeals for the Fifth Circuit Filed January 23, 1996 ..... 43a

Appendix H — Order of the United States Court of Appeals for the Fifth Circuit Filed March 14, 1996 ..... 60a

The Steamship Mutual Underwriting Association (Bermuda) Limited petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case. Petitioner is aware the Caltex Defendants are also petitioning for certiorari. Although this Petitioner agrees with Caltex's position, it files this separate Petition to raise additional points as to why a Petition should be granted.

OPINIONS BELOW

1. The opinion of the equally-divided Court of Appeals for the Fifth Circuit, sitting en banc, is annexed hereto as Appendix A ("App. A") and is reported at 101 F.3d 367 (5th Cir. 1996).

2. The District Court's first dismissal of Plaintiffs' case on the ground of *forum non conveniens*, without prejudice, is annexed hereto as Appendix B ("App. B") and is not reported (S.D. Tex. 1990).

3. The opinion of the first panel of the Court of Appeals, upholding federal jurisdiction but vacating and remanding because the District Court had not imposed conditions guaranteeing that Plaintiffs could fairly prosecute their case in the Philippines, is annexed hereto as Appendix C ("App. C") and is reported at 932 F.2d 1540 (5th Cir. 1991), *cert. denied*, 502 U.S. 963 (1991) (*"Baris I"*).

4. The final judgment and opinion of the District Court on remand, again dismissing the case on the ground of *forum non conveniens* but imposing conditions guaranteeing that Plaintiffs could litigate in the Philippines and specifying that the dismissal was "with prejudice," is annexed hereto as Appendix D ("App. D") and is not reported (S.D. Tex. 1992).

5. The order of the Court of Appeals dismissing Plaintiffs' attempted appeal as untimely is annexed hereto as Appendix E

("App. E") and is reported at 996 F.2d 308 (5th Cir. 1992) (per curiam).

6. The order and opinion of the District Court declining to enjoin Plaintiffs from prosecuting their case in the state courts of Louisiana is annexed hereto as Appendix F ("App. F") and is not reported. (S.D. Tex. 1994).

7. The opinion of the second panel of the Court of Appeals, affirming the District court's denial of injunctive relief, is annexed hereto as Appendix G ("App. G") and is reported at 74 F.3d 567 (5th Cir. 1996) ("*Baris II*").

8. The order of the Court of Appeals granting rehearing en banc and vacating the second panel's opinion in *Baris II* is annexed hereto as Appendix H ("App. H") and is not reported.

STATEMENT OF JURISDICTION

The judgment of the equally-divided Court of Appeals for the Fifth Circuit, sitting en banc, was entered on November 26, 1996 (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the construction and application of the Anti-Injunction Act, 28 U.S.C. § 2283, which provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

STATEMENT OF THE CASE

This matter arises from a 1987 collision between two vessels, both flagged in the Philippines and owned and operated by Philippine corporations. This Petitioner is the mutual insurance association in which one of those vessels, a Philippine ferry boat, was entered.

Litigation was commenced in courts in the Philippines and, subsequently, in a state court in Texas. The Caltex Defendants removed that case pursuant to 28 U.S.C. § 1441(b) as one arising under admiralty and maritime jurisdiction pursuant to 28 U.S.C. § 1333(1) and the Death on the High Seas Act, 46 U.S.C. § 761.

The United States District Court dismissed the case "with prejudice" on *forum non conveniens* grounds as reflected in App. B. The case was appealed, and the Fifth Circuit Court of Appeals vacated the dismissal and remanded the case to the district court for imposition of conditions to guarantee the Plaintiffs the right to litigate the matter in the Philippines as reflected in App. C.

The District Court adhered to the admonition, conditioning its second *forum non conveniens*-based dismissal "with prejudice" appropriately. Plaintiffs failed to take a timely appeal from that order as reflected in App. E, and it became final in December, 1992.

The Plaintiffs, meanwhile, had secretly commenced virtually identical litigation in Louisiana. A comparison of the Louisiana suit filed on December 19, 1988, in Orleans Parish, with the suit filed on December 20, 1989, in Harris County, Texas, which formed the basis for the removed Texas action, reveals that they are identical for all practical purposes. A second filed Texas state court suit, adding Philippine law as a basis for

recovery, was also removed and consolidated with the case while the first case was on appeal. Well after the unsuccessful appeal of the "with prejudice" dismissal issued by the District Court below, the Plaintiffs commenced active prosecution of the Louisiana state suit by serving the Caltex Defendants who, along with this Petitioner, sought relief from the federal District Court in Texas to prevent Plaintiffs from proceeding with prosecution of the Louisiana action. While the District Court termed the Plaintiffs' actions manipulative and repugnant, it believed it was without power to effect a different result and refused the relief sought (App. F). An appeal of the District Court's refusal was effected, and the Fifth Circuit Court of Appeals also found the procedural maneuvering to be "repugnant" and "deplorable," as reflected in App. G, but it upheld the lower court's refusal to act.

Thereafter, the Court of Appeals granted a petition for rehearing en banc and vacated the panel's opinion. Following rehearing en banc, however, the sixteen-member Court was equally divided, operating to affirm the District Court's holding that it was powerless to protect its prior "with prejudice" dismissal, the holding which Petitioners now request this Court to review.

REASONS FOR GRANTING THE WRIT

The opportunity for manipulation of the federal and state court systems to reach a desired result, especially in the maritime *forum non conveniens* arena, countenanced and encouraged by allowing the result below to stand, will lead to an erosion of confidence in our system of justice by foreign litigants. This matter was dismissed "with prejudice" by a federal District Court, yet the same case is now apparently going to proceed, not only in the Philippines, but also in Louisiana, as if this litigation had never occurred. How shall foreign litigants be

expected to understand such a result, especially when it has been so strongly condemned by the very courts which have sat in judgement on it?

It is apparent from the vacated opinion of the Fifth Circuit Court of Appeals (App. G) that this Court's opinions in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988), and *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), are being read too broadly, and the result is to allow the "repugnant" and "manipulative" tactics used here to defeat the plain result initially ordered by the District Court. While a cursory reading of those cases could, and apparently did, lead to the present situation in which Petitioner finds itself, there is nothing in either of those cases which would render the District Court powerless to effectuate its judgment in the circumstances of this case. The Plaintiffs have had their say on the question of the proper forum to decide the litigation which they have filed, litigation which for all practical purposes was identical in Texas and Louisiana. It should be made clear to the District Court, which has ordered foreign litigants to pursue their remedies in their own home country, that it has the power and means to protect and effectuate its judgment, one ultimately rendered after briefing, decision, appeal, re-briefing and further decision — all participated in fully by Plaintiffs' counsel and all directed toward determining the appropriate forum for this case to proceed.

American Dredging did not speak to the issue of the power of a district court to enforce its orders. Neither did it involve a situation like this one. *American Dredging* involved a Jones Act case brought by an American in an American state court. This Court recognized that the Jones Act contained a "uniformity" requirement which requires state courts to apply a uniform federal law, 510 U.S. 443, 455-6. What *American Dredging* simply held, therefore, was that a state court, bound by the law to apply the federal statute in question in a manner uniform

with that in which every other state and federal court is required to apply that law, does not violate the uniformity doctrine of admiralty when its procedural law prevents transfer of such a case to another state's courts. That is manifestly not the situation here, where foreign litigants seek to manipulate our state-federal bifurcated judicial system to reach a decidedly non-uniform result. Importantly, this Court limited its holding in *American Dredging* to domestic situations, specifically stating so at 510 U.S. 457:

> Amicus the Solicitor General has urged that we limit our holding, that forum non conveniens is not part of the uniform law of admiralty, to cases involving domestic entities. We think it unnecessary to do that. Since the parties to this suit are domestic entities it is impossible for our holding to be any broader.

This distinction must be meaningful or the Court would not have made it. It must also be made meaningful, for otherwise all such similarly situated foreign citizen litigants will be faced with results such as the one clearly in the path of these foreign citizen litigants — a non-uniform result in an area where uniform results are clearly expected and deserved.

Likewise, *Choo* does not preclude a district court's granting the injunctive relief sought here. In *Choo*, the initial action dismissed by that federal District Court presented claims under federal statutes, the general maritime law of the United States and a Texas statute. That District Court initially dismissed the federal statutory claims and then dismissed the case on a *forum non conveniens* basis, concluding that both the statutory and maritime law of the United States should not be applied to that situation. Significantly, unlike the Plaintiffs here, Mrs. Choo

did not commence litigation at home. Instead, she commenced litigation in a Texas state court, ultimately seeking relief on the basis of Singapore law and a Texas state-law claim. Her newly filed state case, therefore, involved claims which had not been made in federal court. This is not our situation. The initial suits filed in this case in Texas and Louisiana are for all practical purposes identical, pleading for relief under "laws of the United States, including the general maritime law, and, pursuant to the savings to suitor's clause, . . . as well as such other federal and state laws as may be applicable. . . ." The Texas action added a particular Texas civil statute, and the Louisiana petition added only a procedural provision having to do with the class action status of the Plaintiffs. The second filed Texas action, removed and consolidated with the initial Texas action, also sought relief pursuant to the laws of the Philippines. It was all of these claims which the District Court found should be litigated only in the Philippines.

Unlike *Choo*, therefore, exactly the same claims, and then some, were before the District Court when it made its *forum non conveniens* determination as are before the Louisiana state court. There is no new previously unconsidered claim as there was in *Choo*. This, coupled with the important fact that the *Choo* dismissal was not one entered on a "with prejudice" basis, makes that case clearly distinguishable from the situation at hand. Neither it nor *American Dredging* prevents the District Court's taking the action sought by Petitioners.

Moreover, it was clear to all the litigants what the District Court's "with prejudice" *forum non conveniens* dismissal meant. In opposition to the Caltex Defendants' Motion to Dismiss, Plaintiffs vehemently argued at length to the District Court against any dismissal "with prejudice" because of the impact that it would have on the Louisiana suit. For example, prior to the rendition of the Final Judgment on March 3, 1992 (App. D),

Plaintiffs represented to the District Court that "the Caltex defendants' effort to obtain a dismissal with prejudice is a veiled attempt to prevent prosecution of the plaintiffs' claims not only in this forum, but also in the state courts." [R. Vol. 6, p. 1127]. The Plaintiffs went to great lengths to point out to the District Court the existence of their "protective suit in Louisiana," and vigorously protested a "dismissal of this case with prejudice preventing a prosecution of this claim here in Texas, as well as in Louisiana state court." [R. Vol. 6, p. 1127; R. Vol. 7, pp. 19-20]. What changed in the interim? Only this Court's issuance of the *American Dredging* opinion which is clearly distinguishable as previously noted.

Is the District Court powerless to give effect to its own order which it clearly believed should have put an end to the litigation in the United States, just as the Plaintiffs themselves believed that the dismissal would prevent pursuit of the matter in a Louisiana state court? Doesn't this provide a basis for allowing the injunction sought by the Defendants herein to issue? Every judge who has expressed an opinion on the case thus far has found the situation repugnant and at least eight others, in all likelihood, shared that view.

Our parallel system of federal and state courts should not be abused and misused in this manner, especially when foreign interests are involved. The *forum non conveniens* doctrine is one which should not be susceptible to being so easily ignored in a situation such as this which is pervasively foreign. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), and *Lauritzen v. Larsen*, 345 U.S. 571 (1953), are exemplary of the type of cases which can be adversely impacted and repugnantly manipulated if the present situation in this case is allowed to stand. Given the fact that all concerned, even Plaintiffs' counsel, clearly contemplated that the matter would be terminated by the District Judge's "with prejudice" dismissal, and the fact that *American*

Dredging and *Choo* are clearly distinguishable, it is especially difficult for foreign litigants to understand why the Court should be powerless to give effect to its order. This case presents important questions concerning a district court's power to effectuate its own judgment as well as with respect to the viability of the doctrine of *forum non conveniens* in foreign-based contexts and the confidence which foreign litigants will have in our system of justice.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED NOVEMBER 26, 1996

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 94-20498

VICTOR C. BARIS, ET AL.,

Plaintiffs-Appellees,

versus

SULPICIO LINES, INC., ET AL.,

Defendants,

CALTEX PETROLEUM, INC., ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

Before POLITZ, Chief Judge, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, DEMOSS, BENAVIDES, STEWART, PARKER, and DENNIS.

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* Judge Carolyn D. King is recused and did not participate in this decision.

Appendix A

FOR THE COURT:

By virtue of an equally divided en banc court, the judgment of the district court is AFFIRMED.

s/ Henry A. Politz
Chief Judge

TRUE COPY I CERTIFY
ATTEST: 1-10-97

MICHAEL N. MILBY, Clerk of Court

By s/ illegible
Deputy Clerk

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED JUNE 15, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-90-607

VICTOR C. BARIS, ET AL.,

Plaintiffs,

VS.

SULPICIO LINES, INC., ET AL.,

Defendants.

ORDER

Pending before the Court is Plaintiffs' Motion for New Trial, for Reconsideration, and for Remand (instrument number 8). Having considered the motion and response, as well as the applicable law, the Court is of the opinion that the portion of the motion seeking reconsideration should be granted in part and those portions seeking new trial and remand should be denied.

This cause was filed in state district court on December 20, 1989 alleging wrongful death and survival causes of action as a result of a collision between two ships at the Tablas Straits, between Mindoro and Marinduque Islands in The Philippines. The case was brought "pursuant to the laws of the United States, including the general maritime law, and, pursuant to the saving

to suitors clause, 28 U.S.C. § 1333(1), as well as such other federal and state laws as may be applicable including § 17.031 of the Texas Civil Practice & Remedies Code." Plaintiffs' Amended Petition, at 16.

Notice of removal to federal district court was filed on February 21, 1990. On March 2, 1990, Defendants filed a motion to dismiss. Plaintiffs did not respond to either the notice of removal or the motion to dismiss. On April 10, 1990, this Court entered an order dismissing this cause for improper venue pursuant to F. R. Civ. P. 12(b)(3). Plaintiffs contend that this dismissal order is void for lack of subject matter jurisdiction. Plaintiffs argue that the facts herein do not give rise to a basis for proper removal due to a lack of a federal question, and this Court is therefore without subject matter jurisdiction; if the Court is without subject matter jurisdiction, then all orders are void and the case must be remanded.

Defendants contend that the case was properly removed due to the presence of a federal question in the wrongful death cause of action. Defendants correctly argue that the wrongful death cause of action is governed by the Death on the High Seas by Wrongful Act ("DOSHA"), 46 U.S.C. § 762 *et seq.* It is clear that concurrent jurisdiction is preserved in DOSHA, but state wrongful death statutes are preempted by DOSHA where an accident occurs on the high seas. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232 (1986). Furthermore, the DOSHA is the exclusive remedy for a wrongful death on the high seas. *Id.* A DOHSA claim may properly be brought in state court even though DOSHA is the exclusive remedy for a wrongful death on the high seas. *Filho v. Pozos Intern. Drilling Services, Inc.*, 662 F. Supp. 94, 98 n.4 (S.D. Tex. 1987) (citing, *Offshore Logistics*, 477 U.S. at 221). Where there is concurrent

jurisdiction, the claim may be removed where some basis for federal jurisdiction, other than admiralty, exists. *Poirrier v. Nicklos Drilling Co.*, 648 F.2d 1063, 1066 (5th Cir. 1981). Once a wrongful death case has been brought in state court, however, it is not removable because DOSHA grants only admiralty jurisdiction. *Filho*, 662 F. Supp. at 98.

It is the conclusion of this Court that the DOSHA cause was improperly removed. Improper removal, however, does not necessarily mean that the case should be remanded. If a case has been improperly removed, the federal court has subject matter jurisdiction if the case could have originally been filed in federal court. *Lirette v. N. L. Sperry Sun, Inc.*, 820 F.2d 116 (5th Cir. 1987).

A general maritime law survival action is permitted to supplement a DOSHA claim. *Graham v. Milky Way Barge, Inc.*, 824 F.2d 376, 387 (5th Cir. 1987) (citing *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 894 (5th Cir. 1984)). Where a survival claim is brought under general maritime law, then it is an *in personam* action and the saving to suitors clause permits it to be brought in state court. *Azzopardi*, 742 F.2d at 894. Where a plaintiff has chosen to bring a maritime cause of action in state court, removal is not proper and the federal court must remand such cause, in the absence of any substantial independent federal question or diversity of citizenship, in accordance with the saving to suitors clause. *See Holcomb v. Era Helicopters, Inc.*, 618 F. Supp. 339, 344 (D.C. La. 1985). Even though the general maritime claim in the instant case could not be removed, it is removable under the doctrine of pendent jurisdiction because it is joined with the DOSHA claim. *See Romero v. International Terminal Operating Co.*, 358 U.S. 351, 380-81 (1959).

Appendix B

Even though the DOSHA claim should not have been removed, the dismissal order is not void for lack of subject matter jurisdiction, because the claim pursuant to DOSHA could have originally been brought in federal court. The current motion to remand should therefore be denied.

Plaintiffs request that this Court set aside the dismissal order because no serious misconduct or prejudice to the Defendants exists. The Court concludes that the conduct of Plaintiffs' counsel did not reach the level of "mistake, inadvertence, surprise or excusable neglect" as required by F. R. Civ. P. 60(b). Furthermore, it was not this conduct that brought about the dismissal of the cause.

Upon further reconsideration of the order of dismissal, this Court concludes that the Motion to Dismiss should have been granted based on *forum non conveniens,* and not based on F. R. Civ. P. 12(b)(3). Even though improper venue cannot be attacked on removal, defendant may still attack the federal court venue as inconvenient under *forum non conveniens. Hartford Fire Ins. Co. v. Westinghouse Electric Corp.*, 725 F. Supp. 317, 320 (S.D. Miss. 1989).

It is therefore ORDERED that the motion for new trial and for remand be denied.

It is further ORDERED that the Court's order entered on April 10, 1990 be amended to reflect that dismissal of the cause should be for *forum non conveniens.*

SIGNED this 13 day of June, 1990.

s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JUNE 17, 1991

Victor C. BARIS, et al.,
Plaintiffs-Appellants,

v.

SULPICIO LINES, INC., et al., Defendants,

Caltex Petroleum, Inc., Caltex Petroleum Corporation, and Caltex Oil Corporation, Defendants-Appellees.

No. 90-2646.

United States Court of Appeals,
Fifth Circuit.

June 17, 1991.

Appeal from the United States District Court for the Southern District of Texas.

Before THORNBERRY, JOLLY, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This appeal raises issues regarding federal court jurisdiction over a removed case and the doctrine of forum non conveniens. The district court concluded that it had jurisdiction, then dismissed pursuant to the doctrine of forum non conveniens. We conclude that, while the court had jurisdiction over this

removed action, its analysis of the forum non conveniens issue was deficient. Accordingly, we vacate and remand.

I.

On December 20, 1987, approximately 5,000 citizens of the Philippines lost their lives in the collision of the M/V DONA PAZ and the M/T VECTOR in the Tablas Strait between Mindoro and Marinduque Islands in the Philippines. Defendants Caltex Petroleum, Inc., Caltex Petroleum Corporation, and Caltex Oil Corporation (the "defendants"), corporations with their principal place of business in Texas, were the charterers of the M/T VECTOR. The plaintiffs, representing four survivors and a large number of decedents, brought suit individually and as a class action (not yet certified) to recover compensation for the injuries and deaths.

II.

The suit was filed in state district court "pursuant to the laws of the United States, including the general maritime law, and, pursuant to the savings [sic] to suitor's [sic] clause, 28 U.S.C. § 1333(1), as well as such other federal and state laws as may be applicable including § 17.031 of the Texas Civil Practice and Remedies Code." On February 21, 1990, the defendants removed the matter to federal district court, asserting a right of removal under 28 U.S.C. § 1441(b) and claiming that the suit arises "under the admiralty and maritime jurisdiction of the [federal] court pursuant to 28 U.S.C. § 1333(1) and the Death on the High Seas Act [DOHSA], 46 U.S.C. § 761."

The defendants then answered and moved to dismiss on the basis of, among other grounds, forum non conveniens. For

various reasons that, according to the plaintiffs, are not relevant to this appeal, the plaintiffs failed to respond to the motion to dismiss. On April 10, 1990, the district court dismissed the case, deeming the motion unopposed and basing dismissal upon Fed.R.Civ.P. 12(b)(3) — improper venue.

On April 16, 1990, the plaintiffs moved for new trial, reconsideration, and remand. They asserted that the district court had no subject matter jurisdiction because the case had been improperly removed, that dismissal cannot be based solely upon a failure to respond, and that venue was proper. The plaintiffs also asked the court to set aside its dismissal order as a matter of law or equity and to remand to state court.

The defendants responded, not by supporting improper venue as a ground of dismissal, but by requesting the court to change the basis of its dismissal to forum non conveniens. Without affording plaintiffs an opportunity to reply, the court on June 15, 1990, entered its final order, declaring that the DOHSA and general maritime claims had been improperly removed; that the plaintiffs' failure timely to respond to the motion to dismiss was not the basis for the dismissal; that improper venue is not a proper ground for dismissal in a removed case; and that the court had subject matter jurisdiction, despite the improper removal, since the case could have been filed originally in federal court. The court amended its order of April 10 to reflect forum non conveniens, rather than improper venue, as the reason for dismissal. The plaintiffs appeal from the order of June 15.

Appendix C

III.

We must determine, initially, whether the federal district court had jurisdiction over this removed action. If it did not have jurisdiction at the time it ruled on the question of forum non conveniens, we may not consider that issue and must direct the district court to remand the entire proceeding to state court.

The plaintiffs assert, and the district court held in its order of June 15, that the matter was improperly removed. There is authority for that conclusion although, as we explain *infra*, we need not decide that specific issue.

This action was filed in state court pursuant to the so-called "saving to suitors" clause of section 1333(1).[1] That provision has been construed to permit admiralty and maritime actions, otherwise exclusively within the jurisdiction of the federal district courts, to be brought in state court as well. 1 S. Friedell, *Benedict on Admiralty* § 122 (6th ed. 1991).

In the instant case there is no diversity of citizenship. In *Alleman v. Bunge Corp.*, 756 F.2d 344, 345-46 (5th Cir.1984), we observed that where plaintiffs have exercised their "historic option" (quoting *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371, 79 S.Ct. 468, 479, 3 L.Ed.2d 368 (1959)), to bring an action in state court under the saving to suitors clause, the matter cannot be removed in the absence of diversity. Although there had been some doubt as to whether DOHSA claims may be brought exclusively in the federal courts, the

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1. Section 1333(1) provides that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

Appendix C

Supreme Court recently has stated that DOHSA jurisdiction is concurrent, *i.e.*, that a DOHSA action can be brought in either state or federal court. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 225, 106 S.Ct. 2485, 2495-96, 91 L.Ed.2d 174 (1986).[2]

Thus, we treat this action as one properly brought in state court under DOHSA. If it is removable, the non-preempted survival claims and any general maritime injury claims are removable pursuant to the federal district court's pendent jurisdiction. *Romero*, 358 U.S. at 380-81, 79 S.Ct. at 484-85; *Snyder v. Whittaker Corp.*, 839 F.2d 1085, 1092 (5th Cir. 1988). As we have stated, however, we need not decide whether the cause was removable, as the plaintiffs, in any event, have waived their right to seek a remand.[3]

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2. The Court held that DOHSA preempts state wrongful death statutes. 477 U.S. at 223, 106 S.Ct. at 2494. Subsequently, we have held that survival actions under general maritime law are not preempted by DOHSA. *See Graham v. Milky Way Barge, Inc.*, 824 F.2d 376, 386-87 (5th Cir.1987) (on petition for rehearing).

3. In support of their assertion that absent diversity, a DOHSA claim cannot be removed under the general federal question jurisdiction of 28 U.S.C. § 1331, the plaintiffs refer us to a scholarly opinion by Judge Hittner in *Filho v. Pozos Int'l Drilling Servs., Inc.*, 662 F.Supp. 94 (S.D. Tex.1987). There, the court squarely held that "a claim pursuant to DOHSA fails to invoke federal question jurisdiction." *Id.* at 100.

Resourcefully, the plaintiffs also refer us to a treatise by, *inter alia*, one of defendants' counsel asserting that "removal of a saving clause case probably should not be permitted when there is no diversity of citizenship between the litigants and removal is sought solely because jurisdiction would have existed under Section 1333 *if* the case had been brought in the federal courts originally as an admiralty matter. . . ." 14 C. Wright, A. Miller & E.

(Cont'd)

IV.

Even if this matter was improperly removed, the plaintiffs waived the opportunity to challenge the removal. That is because plaintiffs' motion for remand was untimely under 28 U.S.C. § 1447(c).[4] The plaintiffs do not dispute that they failed, as required by section 1447(c), to file a motion to remand within thirty days after defendants filed their notice of removal. Hence, after the expiration of the thirty-day period set forth in § 1447(c), the district court properly retained jurisdiction, assuming that this is an action that originally could have been brought in federal court, an issue we examine in the next section.

In their opening and reply briefs on appeal, the plaintiffs devote only one paragraph (in the reply brief) to the issue of waiver. They point out that that section applies only to motions to remand based upon "any defect in removal procedure." They aver that they never have contended that there were any *procedural* defects in the removal in this case but that their objection was based solely upon a claimed lack of subject matter jurisdiction.

(Cont'd)

Cooper, *Federal Practice & Procedure* § 3674, at 466 (2d ed. 1985) (emphasis in original). The defendants argue, however, that under *Tallentire*, 477 U.S. at 222-29, 106 S.Ct. at 2494-98, DOHSA actions are not saving-to-suitors cases at all but that, instead, it is § 7 of DOHSA, 46 U.S.C. § 767, that confers concurrent state and federal jurisdiction over DOHSA cases.

4. Section 1447(c) provides in relevant part that "[a] motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under [28 U.S.C.] § 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

Appendix C

The plaintiffs have confused improper removal (i.e., lack of removal jurisdiction) with lack of original subject matter jurisdiction. The former is waivable, *see Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 703, 92 S.Ct. 1344, 1348, 31 L.Ed.2d 612 (1972); *Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116, 117 (5th Cir. 1987) (en banc); the latter is not, *see Hensgens v. Deere & Co.*, 833 F.2d 1179, 1180 (5th Cir. 1987); *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1297 (5th Cir. 1985) (per curiam).

In this regard, section 1447(c) mentions original subject matter jurisdiction, rather than removal jurisdiction, in providing that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." That phrase "refers to want of federal subject matter jurisdiction." 1A J. Moore & B. Ringle, *Moore's Federal Practice* ¶ 0.169[1] at 675 (2d ed. 1990). When Congress has intended to refer to removal jurisdiction, it has distinguished that concept from the doctrine of original subject matter jurisdiction. *See, e.g.*, 45 U.S.C. § 822(e) ("original and removal jurisdiction"). Moreover, this court has had little difficulty in distinguishing between removal jurisdiction, on the one hand, and original or subject matter jurisdiction, on the other hand.[5]

More to the point, the plaintiffs misconstrue what is meant in section 1447(c) by the term "procedural defect." As used in that section, a "procedural" defect is any defect that does not go to the question of whether the case originally could have been brought in federal district court:

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5. *See, e.g., Nolan v. Boeing Co.*, 919 F.2d 1058, 1061 (5th Cir.1990); *Ziegler v. Champion Mortgage Co.*, 913 F.2d 228, 230 (5th Cir.1990); *Carrollton-Farmers Branch Indep. School Dist. v. Johnson & Cravens, 13911, Inc.*, 889 F.2d 571, 572 (5th Cir.1989) (per curiam) (on petition for rehearing). *Accord* 1A J. Moore & B. Ringle, *supra*, ¶ 0.157[11.—4] at 174 ("original and removal jurisdiction").

Appendix C

> The motion to remand must be made within 30 days after removal, if the objections are of a character that can be waived, such as formal and modal matters pertaining to the procedure for removal *or the non-removability of a proceeding otherwise within federal jurisdiction.*

1A J. Moore & B. Ringle ¶ 0.168[4.—1] at 644 (footnotes omitted, emphasis added). Professor Moore thus notes that section 1447(c) concerns "the following situations that may arise in a removed suit: *the action is of a nonremovable character;* or although within removal jurisdiction, defendant has not pursued the proper procedure in removing the suit." *Id.* ¶ 0.157[11.—1] at 166 (emphasis added). The former type of defect is the one at issue here, as we assume *arguendo* that the instant DOHSA claim is non-removable.

There are at least three cognizable combinations of state/federal jurisdictional defects in the context of a removed proceeding: (1) where the state court has jurisdiction but the federal court lacks original and removal jurisdiction; (2) where both state and federal courts have original jurisdiction but there is no federal removal jurisdiction; and (3) where both state and federal courts lack jurisdiction. *Id.* ¶ 0.169[1] at 676. Assuming improper removal, the instant case falls into the second category:

> In the second category, where the state court has jurisdiction of the action, the federal court has original jurisdiction of such an action, but removal of the suit at bar is not warranted, . . . the objection to the action proceeding in the federal court is *a modal*

> ***and formal one.*** If timely taken, the action should be remanded; otherwise, ***the objection is waived, and the removed action may proceed.***

Id. at 678 (footnotes omitted, emphasis added).

Thus, in summary, "an irregularity in removal is waivable and, if waived, a federal court has power to proceed with a removed case that is within its original jurisdiction but is not one subject to removal. . . ." *Id.* ¶ 0.157 [11.—4] at 173. "[W]here the case is actually . . . within the scope of original jurisdiction . . . , all matters concerning the removal of the case to the federal court are capable of waiver. . . ." *Id.* at 175-76. Hence, the word "procedural" in section 1447(c) refers to any defect that does not involve the inability of the federal district court to entertain the suit as a matter of its original subject matter jurisdiction.

"Removal proceedings are in the nature of process to bring the parties before the United States court." *Mackay v. Uinta Dev. Co.*, 229 U.S. 173, 176, 33 S.Ct. 638, 639, 57 L.Ed. 1138 (1913). In *Mackay,* a matter was removed from state court, despite the fact that while the counterclaim exceeded the jurisdictional amount, the plaintiff's claim did not; consequently, the matter was not within the removal jurisdiction of the federal district court and thus was "irregularly removed." *Id.* Nonetheless, the Court held that as neither party had objected to removal, the district court had subject matter jurisdiction and could entertain the cause, as the counterclaim could have been brought as an original action in federal court in satisfaction of the jurisdictional-amount requirement. The "irregularity was waivable and neither it nor the method of getting the parties before the court operated to deprive it of the power to determine the cause." *Id.* at 177, 33 S.Ct. at 639.

Appendix C

For present purposes, the absence of removal jurisdiction in *Mackay* because of an insufficient amount in controversy is no different from the assumed nonremovability of a DOHSA claim. In both cases, the want of removal jurisdiction is for a reason that normally would be considered "substantive": in *Mackay,* an insufficient amount in controversy[6]; here, the nonremovability of a claim brought pursuant to a particular substantive statute. Also in each, the federal district court would have had original jurisdiction if the action had been filed there in the first instance.

The result here is the same as in *Mackay,* that is, that "removal proceedings are in the nature of process." 1A J. Moore & B. Ringle, *supra,* ¶ 0.157[11.—3] (2d ed. Supp.1990). Since "removal proceedings are in the nature of process to bring the parties before the [district] court," *Mackay,* 229 U.S. at 176, 33 S.Ct. at 639, it is a waivable defect that a cause is brought to that court by means of removal rather than by an original complaint. In either event, all that is involved is the process by which the court receives the action, not the subject matter of the claim itself. Thus, when section 1447(c) speaks of "any defect in removal procedure," it includes within its reach the bringing of an action not within the court's removal jurisdiction but that could have been brought originally in that court.

We so treated the issue of waiver in *Petty v. Ideco, Div. of Dresser Indus., Inc.,* 761 F.2d 1146 (5th Cir.1985). There, removal jurisdiction was wanting under 28 U.S.C. § 1441(b), as the defendant was a citizen of the forum state. We held that, as the plaintiff made no timely objection to removal and the cause

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6. "[A] jurisdictional amount requirement goes to subject matter jurisdiction and lack of it cannot be waived. . . ." 1A J. Moore & B. Ringle, *supra,* ¶ 0.157 [11.—4] at 174.

could have been brought originally in the federal district court, the plaintiff waived any objection to removal. 761 F.2d at 1148 n. 1. In *Petty,* as arguably here, the matter came to the federal district court by means of a flawed *process* (i.e., by removal rather than by original petition). As in *Petty,* that procedural deficiency was waived. The result in both cases is that the district court had jurisdiction to entertain the action.[7]

In a very recent case construing section 1447(c), we have defined "any defect in removal procedure" as "all non-jurisdictional defects existing at the time of removal." *In re Shell Oil Co. ("Shell I"),* 932 F.2d 1518, 1521 (5th Cir.1991). Thus, we held in *Shell I* that by not moving to remand within thirty days, the plaintiffs waived a removal defect existing under 28 U.S.C. § 1441(b), *to-wit,* that two of the defendants were residents of the forum state. In a companion case, we now have held that "[a]s amended, § 1447(c) requires that motions for remand must be made within 30 days of removal, *except in cases in which the court lacks subject matter jurisdiction." In re Shell Oil Co. ("Shell II"),* 932 F.2d 1523, 1527 n. 6 (5th Cir.1991)

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7. The plaintiffs argue, at length, the inapplicability of *Grubbs v. Gen. Elec. Credit Corp.,* which states that "where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue . . . is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." 405 U.S. at 702, 92 S.Ct. at 1347. We need not decide whether the rationale of *Grubbs* applies to the instant case because, in any event, the 30-day limit was added to § 1447(c) in 1988 and thus supersedes *Grubbs* in any case in which the plaintiff has not sought remand within the new time limit. *See* Judicial Improvements & Access to Justice Act, Pub.L. No. 100-702, § 1016(c)(1), 1988 U.S.Code Cong. & Admin.News (100 Stat.) 4642, 4670. "Prior to the 1988 amendment to § 1447(c), there was no fixed time limit within which the plaintiff was required to move for a remand." 1A J. Moore & B. Ringle, *supra,* ¶ 0.157[11.—5] at 180.

(emphasis added). Hence, in the instant case, as shown by the reasoning of *Shell I* and *Shell II*, original subject matter jurisdiction is not waivable, but all other defects, including defects in removal jurisdiction, are fully subject to waiver under section 1447(c).[8]

V.

The foregoing discussion assumes that the instant cause

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8. We note that the court in *Shell I*, at 1522 thoroughly examined the legislative record regarding the 1988 amendments to § 1447(c) and observed that the relevant congressional report explained that remand must be sought within 30 days "on any ground other than lack of subject matter jurisdiction." H.R.Rep. No. 889, 100th Cong., 2d Sess. 72 ("House Report"), *reprinted in* 1988 U.S.Code Cong. & Admin.News 5982, 6033. The House Report also explains,

> So long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal courts, or the parties should be subject to the burdens of shuttling a case between two courts that each have subject matter jurisdiction. There is also some risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means of forum shopping if the litigation should take an unfavorable turn. . . . The amendment is written in terms of a defect in 'removal procedure' in order to avoid any implication that remand is unavailable after disposition of all federal questions leaves only State law questions that might be decided as a matter of ancillary or pendant jurisdiction or that instead might be remanded.

House Report at 72, 1988 U.S.Code Cong. & Admin.News at 6033.

could have been brought originally in federal district court. We now easily conclude that it could.

In their principal brief, the plaintiffs never assert that this matter could not have been filed in federal court. They seem to assume that it could have been, and they concentrate their attention on the assertion that this DOHSA claim was not subject to removal. Buried in a short footnote in the plaintiffs' reply brief there finally appears the contention that "[b]ased upon the plaintiffs' pleading, this was not a case which 'could have' been filed in federal court."[9]

It is beyond doubt that although the parties can waive defects in removal, they cannot waive the requirement of original subject matter jurisdiction — in other words, they cannot confer jurisdiction where Congress has not granted it. "Since the district court had no original jurisdiction over this case . . . , a finding that removal was improper deprives that court of subject matter jurisdiction and obliges a remand under the terms of § 1447(c)." *International Primate Protection League v. Administrators of Tulane Educ. Fund,* 1991 WL 79118 at p. *9, 1991 U.S. LEXIS 2781 at *28 (U.S. May 20, 1991). *Accord Hensgens,* 833 F.2d at 1180; *Giannakos,* 762 F.2d at 1297. Thus, once the plaintiff has waived the right to contest removal, "[t]he jurisdictional issue on appeal becomes whether the federal district court would have had jurisdiction over the case had it originally been filed in federal court." *Kidd v. Southwest Airlines Co.,* 891 F.2d 540, 546 (5th Cir. 1990).

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9. Customarily we decline even to consider arguments raised for the first time in a reply brief. E.g., *Najarro v. First Fed. Sav. & Loan,* 918 F.2d 513, 516 (5th Cir.1990); *United States v. Clinical Leasing Serv., Inc.,* 930 F.2d 394, 395 n. 1 (5th Cir.1991) (on petition for rehearing); *Peteet v. Dow Chem. Co.,* 868 F.2d 1428, 1437 (5th Cir. 1989) (citing cases); *United States v. Prince,* 868 F.2d 1379, 1386 (5th Cir.1989).

Appendix C

There is no doubt that a DOHSA claim can be brought as an original matter in federal district court. *Tallentire* settled this question by holding that jurisdiction was concurrent but in no way questioned the capacity of a federal district court to entertain a DOHSA claim filed there originally. When brought as an original suit in federal court, a DOHSA claim is, as the plaintiffs note, "within the *admiralty* jurisdiction." *Accord* T. Schoenbaum, *Admiralty & Maritime Law* § 7-2, at 238 (1987). This is the admiralty jurisdiction conferred by section 1333.

There are special procedures for invoking the admiralty jurisdiction of a federal district court. They are explained helpfully in two cases cited to us by the plaintiffs, *Bodden v. Osgood*, 879 F.2d 184 (5th Cir.1989), and *Alleman*. The specific procedures are imposed by Fed.R.Civ.P. 9(h).[10]

That rule requires that in order to invoke a federal court's admiralty jurisdiction *where there exists an additional ground for federal jurisdiction*, the plaintiff must identify the claim as one in admiralty to make it plain that he wishes to invoke that jurisdictional basis rather than some other. Thus, in *Bodden*,

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10. Rule 9(h) reads in relevant part as follows:

> Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not.

where there was diversity of citizenship and the plaintiff had given conflicting signals as to whether he wished to proceed in admiralty, we concluded that the cause must proceed as an action at law in diversity. 879 F.2d at 186. In *Alleman,* as in *Bodden,* the defendants removed on the basis of diversity. We held that as the plaintiffs had done nothing affirmative to invoke admiralty jurisdiction, the action was properly in federal court only on the basis of diversity jurisdiction and not admiralty. 756 F.2d at 345-46.

The instant plaintiffs can take no comfort in *Bodden* or *Alleman,* however, as these cases are readily distinguishable from the matter before us. Citing only these two cases, the plaintiffs argue that "[t]he only way that this case 'could have' been filed in federal court, is *if* the plaintiffs had *not* invoked the 'saving to suitors' clause and *if* the plaintiffs *had* invoked admiralty jurisdiction under Fed.R.Civ.P. 9(h)." (Emphasis in original.) What the plaintiffs overlook, however, is that by the plain language of rule 9(h) they, having waived any objection to removal, are deemed to have invoked the district court's admiralty jurisdiction. That is because here, unlike the circumstance in *Bodden* or *Alleman,* there is no alternative basis of original federal jurisdiction (such as diversity). Thus, there can be no confusion as to whether the plaintiffs desired "to prosecute their action in a common law court," *Alleman, id.* at 345, i.e., on some jurisdictional basis other than admiralty.

We so conclude because in federal court (and absent diversity of citizenship), a DOHSA claim can be brought only on the admiralty "side" of the docket. *See generally* 2 S. Friedell, J. Geraghty, D. Williams & E. Flynn, *Benedict on Admiralty* § 81b at 7-6 through 7-12 (6th ed. 1990). The plaintiffs observe that "a DOHSA claim is within the *admiralty* jurisdiction of

federal courts and does not fall within federal question jurisdiction" and that "[t]he statute itself [46 U.S.C. § 761] provides that DOHSA suits may be maintained 'in the district courts of the United States, *in admiralty*. . . .'" (Plaintiffs' emphasis.)

Rule 9(h) patently provides that "[i]f the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not." By its very terms, then, the "identifying statement" requirement of rule 9(h) applies only to a claim "that is also within the jurisdiction of the district court on some other ground" than admiralty. *"[U]nless the claim is cognizable only in admiralty,* the special practice features for admiralty claims are not applicable." *Bodden,* 879 F.2d at 186 (emphasis added).

As a consequence, these plaintiffs, having waived any objection to removal, are relegated to the admiralty jurisdiction of the federal district court, as that is the only jurisdictional basis for a DOHSA claim in federal court, absent diversity or some other jurisdictional basis. To be sure, that is not the forum that these plaintiffs have chosen, but such is the grist of the waiver mill.

In summary, this is an action that the plaintiffs *could have brought* in federal court, in admiralty. No special averment under rule 9(h) would have been required because, as a DOHSA claim, the action could have been brought only in admiralty, there being no diversity. The point is that had the plaintiffs so chosen, the federal district court would have had original subject matter jurisdiction over the claim. That is why, once any objection to removal was waived, the district court was able to retain jurisdiction.

Appendix C

The plaintiffs answer that not only did they fail to invoke admiralty jurisdiction under rule 9(h), but they also affirmatively invoked state court jurisdiction by means of the saving to suitors clause. It is certainly true that the plaintiffs had the option, which they exercised, to file in state court. It is no different from the option of many plaintiffs, in and out of the admiralty/maritime context, to select a forum. But that selection, as always, is subject to any right of a defendant to remove and to the possibility that the plaintiff may waive his right to the forum of his choice. And any such waiver carries with it the waiver of any rights or procedures peculiar to state court, such as, *inter alia,* the right to a jury or to special time limits or discovery procedures under state law and state procedural rules.[11]

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11. In a post-argument brief filed by leave of court, the plaintiffs contend for the first time that the defendants never raised the issue of waiver in the district court and hence cannot urge waiver for the first time on appeal. The defendants respond that they did raise waiver in their opposition to plaintiffs' motion for new trial, reconsideration, and remand. They also note that recently in *Masinter v. Tenneco Oil Co.*, 867 F.2d 892 (5th Cir.1989), the defendant asserted a new defensive theory shortly before oral argument. We held that "[w]hen the judgment of the district court is correct, it may be affirmed on appeal for reasons other than those asserted or relied on below." *Id.* at 896 (citing *Terrell v. University of Tex. Sys. Police,* 792 F.2d 1360, 1362 n. 3 (5th Cir.1986), *cert. denied,* 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987)).

We also observe that the plaintiffs appear to have waited too long to assert that defendants cannot now raise the waiver issue. "In the absence of manifest injustice, this court will not consider arguments belatedly raised after appellees have filed their brief." *Najarro v. First Fed. Savs. & Loan,* 918 F.2d at 516. In *Najarro,* the "belated" argument appeared for the first time in appellants' reply brief; here, it is raised for the first time after oral argument. In a manner of speaking, plaintiffs have *waived* the right to argue that defendants have *waived* their *waiver* argument. *See supra* note 9.

Appendix C

In their final effort to establish that this claim could not have been brought originally in federal district court, the plaintiffs call our attention to *Armstrong v. Alabama Power Co.*, 667 F.2d 1385 (11th Cir. 1982) (Thornberry, J., sitting by designation). In *Armstrong*, a maritime wrongful death action was brought in state court under the saving to suitors clause. A third party complaint against the United States was brought under the Suits in Admiralty Act, 46 U.S.C. § 741 *et seq.* (1975), which provided for exclusive jurisdiction in federal court. Instead of moving to dismiss, the United States removed to federal court.

The Eleventh Circuit affirmed the district court's remand to state court, which was based upon the doctrine of derivative removal jurisdiction. That doctrine, since abolished by the addition of 28 U.S.C. § 1441(e) in 1986,[12] provided that a federal court cannot obtain, through removal, jurisdiction over a claim as to which the state court had no jurisdiction. In *Armstrong* the state court had no jurisdiction over the Suits in Admiralty Act claim; thus, the federal court could not inherit that action by removal.

Here, by way of contrast, the plaintiffs fervently and accurately aver that the state court had jurisdiction over their claim. Even if section 1441(e) had not been enacted, the rationale of *Armstrong* would not apply to the instant case.

In summary, the district court properly had jurisdiction over

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12. *See* Judicial Improvements Act of 1985, Pub.L. No. 99-336 § 3(a), 1986 U.S.Code Cong. & Admin.News (100 Stat.) 633, 637. Section 1441(e) provides that "[t]he court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim."

the instant cause, once the right to contest removal was waived by the failure to raise that issue within thirty days under section 1447(c). The district court thus had jurisdiction to consider the question of forum non conveniens. We address that issue now.

VI.

Plaintiffs argue that the district court failed to apply the required analytical rubric in reaching its forum non conveniens determination. We have observed the need for such a methodology: "While we recognize that the decision to grant or deny a motion to dismiss for forum non conveniens is within the discretion of the district court, it should be an exercise in structured discretion founded on a procedural framework guiding the district court's decisionmaking process." *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1165 (5th Cir. 1987) (en banc) (citations omitted), *vacated on other grounds sub nom. Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032, 109 S.Ct. 1928, 104 L.Ed.2d 400 (mem.), *opinion reinstated on other grounds*, 883 F.2d 17 (5th Cir. 1989) (en banc). In this case, plaintiffs specifically contend that the district court failed (1) to determine whether a foreign forum was available and adequate; (2) to balance public and private interest factors; (3) to impose appropriate conditions on the dismissal; and (4) to provide a meaningful framework for appellate review.

We agree with the plaintiffs' contentions. The district court incorrectly transformed its previous dismissal, based upon "improper venue," into a dismissal based upon forum non conveniens, without further comment. The court, however, did address in its previous "improper venue" dismissal order some of the factors upon which it relied in its later forum non conveniens determination.

Appendix C

The court considered the defendants' motion to dismiss to be unopposed and apparently based its decision upon the factual allegations contained in the complaint and the motion to dismiss. Together these documents demonstrate (1) that the plaintiffs are citizens of the Philippines; (2) that the collision occurred in the Philippines; (3) that the vessels that collided operated in the waters of the Philippines; (4) that the defendants are foreign corporations with their principal place of business in Texas; and (5) that there are similar suits arising out of the same accident presently pending in the Philippines.[13]

Nevertheless, the plaintiffs complain that even though the defendants had the burden of persuasion on this issue, *see Air Crash, id.*, they presented no affidavits and provided only unsworn allegations. The plaintiffs also insist that while there may have been other claims pending against the defendants in the Philippines, this fact alone is not determinative of the availability or adequacy of a foreign forum. The defendants argue that this indeed was enough, and, citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253-54, 102 S.Ct. 252, 264-65, 70 L.Ed.2d 419 (1981), maintain that it was not necessary to show that the remedies available in the Philippines are similar to those in the United States. Their argument, however, is unpersausive.

The plaintiffs are correct in their assertion that the defendants have failed to show that a foreign forum was available and adequate. Such "[a] foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum." *Air Crash*, 821 F.2d at 1165 (citing *Syndicate 420 at Lloyd's London v. Early Am. Ins. Co.*, 796 F.2d 821, 830 (5th

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13. Apparently, the federal district courts have entertained at least one suit against Caltex regarding this collision. *See Carreon v. Caltex Philippines*, No. 90-0931, 1990 WL 142029 (E.D.La. Sept. 25, 1990).

Cir.1986)). And "[a] foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court." *Id.* (citing *Syndicate 420,* 796 F.2d at 829) (additional citation omitted). In *Air Crash,* we held "that a moving defendant need not submit overly detailed affidavits to carry its burden, but it 'must provide enough information to enable the district court to balance the parties [sic] interests.' "[14] *Id.* at 1164-65 (quoting *Piper,* 454 U.S. at 258, 102 S.Ct. at 267).

By showing only that they were being sued in the Philippine courts by the relatives of the survivors of this maritime disaster, the defendants failed to provide sufficient information with which to support the required "procedural framework." In fact, the defendants appear to have misread *Piper,* in which the Court required that the defendant, at a minimum, demonstrate that he is "amenable to process" in the other forum. 454 U.S. at 255 n. 22, 102 S.Ct. at 265 n. 22. Furthermore, the Court held that the mere fact that a foreign court has jurisdiction over claims relating to the same cause of action does not mean that that country's law relating to the subject of the suit cannot change in the interim and thereby render the forum constructively unsuitable for

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14. In *Air Crash* we further stated that "the necessary detail [required by defendants] will depend upon the particular facts of each case." 821 F.2d at 1165 n. 28. We observed that " 'a motion to dismiss for forum non conveniens does not call for a detailed development of the entire case.' " *Id.* (quoting *Fitzgerald v. Texaco, Inc.,* 521 F.2d 448, 451 n. 3 (2d Cir.1975), *cert. denied,* 423 U.S. 1052, 96 S.Ct. 781, 46 L.Ed.2d 641 (1976)). It should be noted, however, that we require a defendant to put forth unequivocal, substantiated evidence presented by affidavit testimony in order for the district court to satisfy the standard enunciated in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947). *See Svendsen v. Pozos Int'l Drilling Co.,* 928 F.2d 401 (5th Cir.1991) (unpublished).

presentation of the claim. *Id.* at 254-55, 102 S.Ct. at 265. Hence, as we have noted in *Svendsen* and in *Nolan v. Boeing Co.*, 919 F.2d at 1068, in order to fulfill the requirements of *Gulf Oil*, a more detailed presentation must be made by the defendants concerning the private interest factors in order that the district court can address the six-factor test.[15]

The plaintiffs' second argument is that the district court did not adequately explicate the public or private interest factors. Defendants state, to the contrary, that the public factors mentioned in the record amply show that trying the case in Texas would be quite inconvenient for all parties and that the private interest factors discussed by the court demonstrate that the trial also would be a logistical nightmare.

Indeed, defendants maintain that under similar facts, the court in *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871, 108 S.Ct. 199, 98 L.Ed.2d 150 (1987), reached the same conclusion

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15. In determining each forum's convenience to the parties, the court must weigh the following private interest factors:

> relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the costs of obtaining attendance of willing, witnesses; probability of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy expeditious and inexpensive. There may also be questions as to the enforcibility [sic] of a judgment if one is obtained.

Air Crash, 821 F.2d at 1162 (quoting *Gulf Oil*, 330 U.S. at 508, 67 S.Ct. at 843).

after focusing upon the public and private interest factors. In that case, since the accident occurred in India, all the plaintiffs were citizens of India, and most of the witnesses lived in India, *id.* at 200-01, the court agreed with the district court and held that the best forum to hear the cause of action would be in that country. *Id.* at 206.

The plaintiffs' contention has merit. Once an adequate and available foreign forum is found to exist, the district court should consider all of the relevant private interest factors to determine each forum's convenience to the parties. *Air Crash,* 821 F.2d at 1164. If the private factors weigh in favor of dismissal, no further inquiry need be made. *Id.* at 1165. Indeed, only if the court cannot determine whether such private factors weigh in favor of dismissal is it required to examine the public interest factors at all. *Id.*[16]

In this instance, most of the factors that the court mentioned as the basis for its forum non conveniens determination are public interest factors that should not enter into its decision until after it resolves the six private interest factors. While the court cited in its order of dismissal that sources of proof and witnesses are located in the Philippines, it did not consider any other public or private interest factors, nor did it consider the benefits of having the case heard in Texas. The court simply described the

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16. The public interest factors, as enumerated in *Gulf Oil,* include "the administrative difficulties flowing from court congestion; the local interest in having localized controversies resolved at home; the intent in having the trial of a diversity case in a forum that is familiar with the law that must govern the action; the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty." *Id.* at 1162-63 (citing *Gulf Oil,* 330 U.S. at 508-09, 67 S.Ct. at 843).

nationalities of the parties, the place of the accident, the fact that other suits are pending against a Caltex party from this cause of action in the Philippines, and the fact that generally sources of proof and witnesses are located there. Such formulation does not provide us with an adequate opportunity to determine whether the district court attempted to satisfy the *Gulf Oil* standard by balancing the interests of the parties and by considering the relative convenience of the two forums.

Next, the plaintiffs argue that the district court failed to impose any conditions on the dismissal and that this is contrary to *Air Crash,* in which we stated that a district court must "ensure that a plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice. . . ." 821 F.2d at 1166. The defendants cite no contrary authority. Instead, they find a certain irony in citizens of the Philippines complaining that the dismissal failed to protect their right to sue in the courts of their home country.

The defendants' general argument overlooks many problems associated with "return jurisdiction" cases, such as statutes of limitations, political influences in the home state in favor of the opposing part, and obstruction of justice. While the district court is given the discretion to determine the conditions of dismissal or to determine that the dismissal should be unconditional under the circumstances, *see Zekic v. Reading & Bates Drilling Co.,* 680 F.2d 1107, 1109 (5th Cir.1982),[17] *Air Crash* requires the courts to ensure that plaintiffs can reinstate suits in American courts if the defendants obstruct jurisdiction in the alternative forum. 821 F.2d at 1166.

Thus, courts must take measures, as part of their dismissals

17. *Zekic* was overruled on other grounds by *Air Crash.*

in forum non conveniens cases, to ensure that defendants will not attempt to evade the jurisdiction of the foreign courts. Such measures often include agreements between the parties to litigate in another forum, to submit to service of process in that jurisdiction, to waive the assertion of any limitations defenses, to agree to discovery, and to agree to the enforceability of the foreign judgment. *See, e.g., Svendsen; Union Carbide,* 809 F.2d at 198.

The district court failed to include any return jurisdiction clause in its order of dismissal. Although the defendants attempt to play down the importance of such a clause owing to the fact that the plaintiffs are residents of the alternate forum, this simplified analysis does not appear to satisfy the *Air Crash* test. While we assume that Caltex companies are defending a number of cases already in the Philippine courts, concerning this specific accident, plaintiffs would have no guarantee that the defendants will submit to the jurisdiction of the court in this instance or will waive any limitations defenses. The defendants, however, have mentioned in their briefs that they would be amenable to having the case remanded to the district court to place such conditions in the order of dismissal. While such conditions probably would not solve the *Gulf Oil* problems, they would enable the plaintiffs to secure the opportunity to litigate their case in another forum.

Finally, the plaintiffs insist that the district court failed to set out its findings and conclusions supporting the motion to dismiss for forum non conveniens and that this deficiency precludes meaningful appellate review. In *Air Crash,* we stated that "[i]f we are not supplied with either a written or oral explanation of the court's decision we will not be reluctant to vacate the lower court's judgment and remand because we do not perform a de novo resolution of forum non conveniens

issues." 821 F.2d at 1166 n. 32 (citing *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1308 (11th Cir.1983)).

Thus, the district court has failed to follow this circuit's analytical framework for dismissing a case on forum non conveniens grounds. It appears to have generalized, from a number of public interest factors, that these specific plaintiffs should have no problem in bringing their suit against the defendants in their home country, as some persons apparently have done. In so concluding, the court has not observed the procedural safeguards developed by the Supreme Court and by this court to guarantee that such litigants have a fair opportunity to litigate in the alternate forum and that if the defendants refuse to submit to such jurisdiction, the plaintiffs can litigate their claims in American courts.

Accordingly, we remand so that the district court can begin afresh its forum non conveniens determination. In its discretion, it may wish to permit the parties to make additional submissions on this issue. We intimate no view as to what ultimate decision the court should make on the forum non conveniens issue, as this is a matter within the court's discretion.

The judgment of dismissal is VACATED, and this matter is REMANDED for further proceedings in accordance with this opinion.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED MARCH 5, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-90-607
CONSOLIDATED WITH
CIVIL ACTION NO. H-91-208

VICTOR C. BARIS, ET AL.,

Plaintiffs,

VS.

SULPICIO LINES, INC., ET AL.,

Defendants.

ORDER

Pending before the Court is the defendants', Caltex Petroleum Corp., Caltex Oil Corp., Caltex (Philippines) Inc., Caltex Services (Philippines) Inc., Caltex Services Corp., American Overseas Petroleum Ltd., Caltex Oil (Delaware) Corp., Caltex (Asia) Ltd., and California Texas Oil Corp. (collectively "Caltex"), motion to dismiss pursuant to forum non conveniens. After considering the motion, the response, the record on file, and the applicable law, it is this Court's opinion that the motion should be granted.

Appendix D

Facts

On December 20, 1981, approximately 5,000 persons were killed when the M/V Dona Paz and the M/T Vector collided off the coast of the Philippines. The plaintiffs, on behalf of four survivors and numerous decedents, brought these consolidated civil actions individually and as a class action (not yet certified) against the defendant corporations. The defendants, Caltex Petroleum, Inc., and Caltex Oil Corporation, are corporations with their principal place of business in Texas and were charterers of the M/T Vector.

The plaintiffs initially filed the first suit in state district court under the United States' general maritime law, the "saving to suitors" clause of 28 U.S.C. §1331(1), and §17.031 of the Texas Civil Practice and Remedies Code. The defendants, Caltex Oil Corporation and Caltex Petroleum Corporation removed the action to this Court under 28 U.S.C. §1441(b) on February 21, 1990.

After removal to this Court, the plaintiffs failed to timely move to remand. On June 15, 1990, this Court entered its final order and dismissed the case for forum non conveniens. The plaintiffs then appealed from the order of June 15 to the Court of Appeals for the Fifth Circuit. The Fifth Circuit, however, remanded the case to this Court for further proceedings consistent with their opinion in *Baris, et al. v. Sulpicio Lines, Inc., et al.*, 932 F.2d 1540 (5th Cir. 1991).

The plaintiffs subsequently filed a second suit in the state district court based on the same transaction or occurrence as the first suit. The Caltex defendants removed the second suit to this Court and the two cases were consolidated. Caltex now renews its motion for dismissal pursuant to forum non conveniens.

Appendix D

Forum Non Conveniens

In determining whether to grant or deny a motion to dismiss for forum non conveniens, this Court must first decide whether an available and adequate foreign forum exists. *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1165 (5th Cir. 1987) (en banc) *vacated on other grounds sub nom. Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032 (mem.), *opinion reinstated on other grounds*, 883 F.2d 17 (5th Cir. 1989) (en banc). A foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum. *Baris, et al. v. Sulpicio Lines, Inc., et al*, 932 F.2d 1540, (5th Cir. 1991) (citing *Air Crash*, 821 F.2d at 1165). A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy the same benefits as they might receive in an American court. *Id.*

Available Forum

It is clear that the defendants' submission to the jurisdiction of an alternative forum renders that forum available for purposes of forum non conveniens analysis. *Syndicate 420 at Lloyd's London v. Early American Ins.*, 796 F.2d 821, 830 (5th Cir. 1986) (citing *Voba-Chemie A. G. v. M/V Getafix*, 711 F.2d 1243, 1245 (5th Cir. 1983)). This Court can ensure that an available forum exists by conditioning the dismissal of forum non conveniens on Caltex's waiver of jurisdictional defenses. *See Syndicate 420*, 794 F.2d at 830. Indeed, the evidence shows that Caltex is amenable to service of process in the Philippines. The evidence further shows that the defendants in this case were sued in the Philippine court by representatives of the survivors of this maritime disaster. Accordingly, the Philippines is an available forum.

Appendix D

Adequate Forum

After considering the plaintiffs' contentions that Philippine law would deprive them of various remedies, this Court concludes that the available remedies in the Philippine courts are not so "clearly inadequate or unsatisfactory" as to amount to no remedy at all. *See Air Crash,* 821 F.2d at 1164, n.27. In this case, the difference between the remedies available in Texas and those available in the Philippines are insufficient to render the Philippine forum inadequate.

Balancing the Public and Private Interests

Having found that the Philippine forum is both available and adequate, this Court must now balance the public and private interests factors outlined by the Supreme Court in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508-09 (1947). If the private interest factors weigh in favor of dismissal, no further inquiry need be made. *Baris,* 932 F.2d at 1550. (citing *Air Crash,* 821 F.2d at 1164). This Court is required to examine the public interest factors only if it cannot determine whether the private interest factors weigh in favor of dismissal. *See id.*

The private interest factors considered by this Court relate primarily to the litigants' convenience. These factors include "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of viewing the premises, if viewing the premises would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of the judgment if one is obtained." *Gulf Oil,* 330 U.S. at 508.

Appendix D

The evidence shows that trial in the Philippines will best serve the litigants' convenience and the ends of justice. The Philippine Coast Guard's Board of Marine Inquiry conducted an extensive investigation of the collision and those investigators reside in the Philippines. The plaintiffs are primarily citizens or residents of the Philippines and are closer to a Philippine forum than an American forum. The collision occurred in the Philippines and the witnesses of the collision are primarily Filipino. These witnesses would not be subject to service of process in this Court and would probably require an interpreter to testify. The transportation of foreign witnesses would add significant costs to this litigation.

Although the Caltex defendants' parent corporation, Caltex Petroleum Corporation, has its principal place of business in Texas, the primary defendants are Philippine or foreign corporations. Accordingly, it would be less difficult for the plaintiffs to enforce a judgment against the defendants in the Philippines than in America. Further, should a view of the accident site be necessary, a Philippine forum would be more convenient than a Texas forum.

Because the private interest factors clearly weigh in favor of dismissal, this Court need not consider whether the public interest factors similarly favor dismissal. *See Baris*, 9 F.2d at 1550-51. (citing *Air Crash*, 821 F.2d at 1164).

Conclusion

The Court concludes that the Philippines is an adequate and available forum for adjudication of this dispute. The Court further finds that the private interest factors weigh heavily in favor of having this dispute adjudged in the Philippines.

Appendix D

Accordingly, it is ORDERED that the defendants', Caltex Petroleum Corporation, Caltex Oil Corporation, Caltex (Philippines) Inc., Caltex Services (Philippines) Inc., Caltex Services Corporation, American Overseas Petroleum Ltd., Caltex Oil (Delaware) Corporation, Caltex (Asia) Ltd., and California Texas Oil Corporation, motion to dismiss for forum non conveniens is GRANTED, dismissing the complaint with prejudice, conditional upon the above named defendants certifying in the record by March 30, 1992, that each defendant will:

1. Submit to service of process and jurisdiction in the appropriate forum in the Philippines;

2. Formally waive in the proceeding in the Philippines any statute of limitations defense that has matured since the commencement of this action in American courts;

3. Agree that any depositions, answers to interrogatories, responses to requests for production of documents, and admissions filed in these consolidated cases may be used in the Philippine proceeding to the same extent as if they originated there;

4. Make available in the Philippine proceeding all relevant documents under their control and all relevant witnesses who were their employees at the time of the accident and who remain their employees at the time of the trial of the matter in the Philippines; and

5. Formally agree in the Philippine proceeding to satisfy any final judgment rendered by such court.

Appendix D

Should the above named defendants fail to so certify by March 30, 1992, this Court will then consider the defendants' motion as denied and this Court shall resume jurisdiction over these consolidated cases.

It is so ORDERED.

SIGNED this 3rd day of March, 1992.

s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED DECEMBER 9, 1992

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-2296
Summary Calendar

VICTOR C. BARIS, ET AL.,

Plaintiffs-Appellants,

VERSUS

SULPICIO LINES, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
(H-90-607)

Before JONES, SMITH, and WIENER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' motions to dismiss the above appeal are GRANTED.

IT IS FURTHER ORDERED that appellants' motion to stay further proceedings in this court is DENIED as moot, the district court now having denied appellants' motion to reconsider.

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED JUNE 29, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-90-607
CONSOLIDATED

VICTOR BARIS, ET. AL.,

Plaintiffs,

VS.

SULPICIO LINES, ET. AL.,

Defendants.

ORDER

Pending before this Court is the defendants' motion to enforce final judgment and for injunctive relief (instrument # 83). The plaintiffs have responded and the Court, having reviewed the pleadings and responses, is of the opinion that the defendants' motion shall be denied.

The sole question for determination by the Court is whether the final judgment entered by this Court addressing the *forum non conveniens* issue, bars litigation by the plaintiffs in a previously filed Louisiana case brought pursuant to the "savings to suitors clause." Title 28 U.S.C. § 1333(1).

Appendix F

Because federal and state courts enjoy concurrent jurisdiction over causes of action brought under the Death on the High Seas Act and because the laws of the state of Louisiana do not recognize the *forum non conveniens* theory, no conduct is exposed that violates this Court final judgment.

This move by the plaintiffs that manipulates several court's jurisdiction simultaneously is repugnant to both the rules of this Court and the spirit behind the enactment of rules that dictate order and efficiency among courts with concurrent jurisdiction. While this Court does not condone forum shopping as a procedural tool to avoid certain judges, courts, and the effect of law, the Court, nevertheless, recognizes a party's fundamental right to do so.

Page Two of instrument number 89 which contains "gibberish" is stricken.

It is ORDERED that the defendants' motion is DENIED.

Signed this 29th day of June, 1994.

s/ Kenneth M. Hoyt
KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE

APPENDIX G — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JANUARY 23, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20498

VICTOR C. BARIS, et al.,

Plaintiffs-Appellees,

VERSUS

SULPICIO LINES, INC., et al.,

Defendants,

CALTEX PETROLEUM, INC., et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

Before SMITH and EMILIO M. GARZA, Circuit Judges, and Stagg,* District Judge.

JERRY E. SMITH, Circuit Judge:

Caltex Petroleum, Inc. ("Caltex"), and Steamship Mutual

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* District Judge of the Western District of Louisiana, sitting by designation.

Underwriting Association (Bermuda), Ltd. ("Steamship Mutual"), appeal the district court's denial of an injunction to bar plaintiffs' suit in Louisiana state court. Concluding that the district court did not reversibly err, we affirm.

I.

In December 1987, the M/V DONA PAZ collided with the M/T VECTOR in the Tablas Strait in the Philippines; approximately 5,000 Filipino citizens lost their lives. The M/V DONA PAZ was a ferry boat owned and operated by Sulpicio Lines, Inc., a Philippines corporation; the M/T VECTOR was a tanker owned and operated by Vector Shipping Corp., also a Philippines corporation. At the time of the collision, the tanker was carrying petroleum products for Caltex Petroleum, Inc., Caltex Petroleum Corporation, and Caltex Oil Corporation, corporations with their principal place of business in Texas.

II.

Plaintiffs, family members of those who perished, filed suit in Louisiana state court in December 1988 but withheld service of process for five years. In December 1989, plaintiffs, individually and on behalf of a class purported to number up to 5,000 Filipinos, sued in Texas state court, naming nine Caltex defendants (collectively "Caltex") and seventeen other defendants. The class, however, has never been certified. Claims were made pursuant to general maritime law, the Death on the High Seas Act, and other provisions of state and federal law pursuant to the saving to suitors clause, 28 U.S.C. § 1331(1). Plaintiffs asserted that Caltex was negligent in entrusting its cargo for shipment on the M/T VECTOR.

Appendix G

The case was removed to federal court in February 1990. The district court upheld its subject matter jurisdiction and dismissed on *forum non conveniens* ("f.n.c.") grounds in June 1990.

Plaintiffs appealed on the grounds that the district court lacked subject matter jurisdiction and, in the alternative, had failed to apply the correct analysis to the f.n.c. claim. In *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540 (5th Cir.), *cert. denied*, 112 S. Ct. 430 (1991) ("*Baris I*"), we upheld the district court's jurisdiction but vacated and remanded on the f.n.c. issue. We expressed concern that the district court had not imposed conditions that would guarantee the plaintiffs a fair opportunity to litigate in the Philippines. *Id.* at 1552.

While the appeal was pending, plaintiffs filed another suit in Texas state court against Caltex in August 1990; process was served five months later. This suit was similar to the first Texas state action and was removed in January 1991, then consolidated with the first matter in July 1991.

Caltex again moved for a dismissal on f.n.c. grounds. On March 3, 1992, the district court determined that the Philippines was the proper situs for the litigation and that the Philippines provided an adequate and available forum. The motion to dismiss was granted with prejudice.

The dismissal was conditioned on five things that would ensure that the defendants would be amenable to suit in the Philippines. Defendants had to certify that each would (1) submit to service of process and jurisdiction in the Philippines; (2) formally waive any statute of limitations defense; (3) agree that discovery already taken could be used in the Philippines; (4)

make available in the Philippines all relevant documents and witnesses under its control; and (5) formally agree to satisfy any final judgment rendered by the Philippine courts. Caltex agreed to the conditions and has fully complied with the court order. Moreover, the plaintiffs have initiated litigation in the Philippines.

Plaintiffs failed timely to appeal the dismissal. As a result, this court dismissed their appeal. *See Baris v. Sulpicio Lines, Inc.*, No. 92-2296 (5th Cir. Dec. 9, 1992) (per curiam) (unpublished).

The Louisiana state suit that had been filed in December 1988 was served on Caltex in late December 1993. Apparently, the suit was a secret until two defendants, Sulpicio Lines, Inc. ("Sulpicio"), and Steamship Mutual happened upon it in February 1990. Those defendants attempted to remove, but in September 1990 the Louisiana federal court remanded the matter to state court. Caltex had not yet been served and was not a party to the removal and remand proceedings. The suit was dormant until Caltex was served in December 1993.

In January 1994, Caltex attempted to remove the case to Louisiana federal court. On May 13, 1994, the matter again was remanded on the ground that the Caltex removal was untimely because more than one year had passed since suit was filed. The court did not address the argument that the Louisiana suit had been revived merely in order to avoid the preclusive effect of the Texas dismissal.

Caltex returned to Texas to seek relief from the federal district court that had entered the f.n.c. dismissal with prejudice. Caltex filed a motion for a hearing to force the plaintiffs to show

why they should not be enjoined from pursuing their claims in any American court. The court denied injunctive relief, apparently thinking that it was powerless to grant it.

The court stated that it thought that the dismissal with prejudice applied only to the relitigation of the f.n.c. issue. Although the court found the plaintiffs' tactics "repugnant," it held that it had no jurisdiction to enforce its prior decision because it concluded that in dismissing on f.n.c. grounds, it had not entered a final judgment on a substantive point of law. The defendants now appeal the refusal to grant injunctive relief.

III.

The Anti-Injunction Act states:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283. The last exception, "to protect or effectuate its judgments," is commonly referred to as the "relitigation exception." District courts can enter injunctions as a means to enforce prior judgments. *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877, 881 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1541 (1994); *Santopadre v. Pelican Homestead & Sav. Ass'n*, 937 F.2d 268, 273 (5th Cir. 1991). Res judicata operates as a bar — enforceable by federal injunction — to a state proceeding in which a party seeks to relitigate claims that have been decided by a federal court.

Appendix G

As a general matter, federal courts have ancillary jurisdiction[1] to enjoin relitigation in state court; they do not need a basis for jurisdiction that is independent of the jurisdiction that supported the original judgment. *Mooney Aircraft, Inc. v. Foster*, 730 F.2d 367, 374 (5th Cir. 1984). Ancillary jurisdiction enables a court "to manage its proceedings, vindicate its authority, and effectuate its decrees." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 114 S. Ct. 1673, 1676 (1994).

In this case, the district court's prior judgment, which Caltex argues can support an injunction against the Louisiana proceedings, dismissed the claims "with prejudice," provided certain conditions allowing litigation in the Philippines were met. The Caltex defendants maintain that this dismissal precludes the plaintiffs from litigating their claims in any court, state or federal, in the United States.

A dismissal "with prejudice" has important consequences: "It is clear that a stipulation of dismissal with prejudice, or, for that matter, a dismissal with prejudice at any stage of a judicial proceeding, normally constitutes a final judgment on the merits which bars a later suit on the same cause of action." *Astron Indus. Ass'n v. Chrysler Motors Corp.*, 405 F.2d 958, 960 (5th Cir. 1968); *see also* 1B JAMES W. MOORE & JO D. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 0.409 [1.—2], at III-140 (2d ed. 1995). We conclude, however, that the dismissal on f.n.c. grounds in this case, whether designated as "with prejudice" or "without prejudice," cannot serve as the res judicata foundation for a later injunction against the Louisiana state proceedings.

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1. For actions filed on or after December 1, 1990, "ancillary jurisdiction" is included within what is now called "supplemental jurisdiction." *See Royal Ins.*, 3 F.3d at 881 n.2.

Appendix G

Generally, res judicata acts as a bar to a subsequent suit when the resolution of the initial proceeding has been "on the merits," which suggests that the substantive claims have been addressed by the court. *See generally* 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4435 (1981). The common law venue rule of f.n.c., by contrast, is a doctrine "of procedure rather than substance." *American Dredging Co. v. Miller*, 114 S. Ct. 981, 988 (1994).

Our inquiry is not ended, however, as the use and application of the phrase "on the merits" has been imprecise at best. *See* 18 WRIGHT ET AL., *supra*, at 329-30. This court has held that certain dismissals that do not reach the substantive issues of the litigation still may be regarded as "on the merits" for purposes of res judicata and preclusion. *See, e.g., Anthony v. Marion County Gen. Hosp.*, 617 F.2d 1164, 1168-69 (5th Cir. 1980).

Defendants cite several cases for this proposition, including *Anthony*. But all of these cases involve involuntary dismissals of the type anticipated by FED. R. CIV. P. 41(b), which states:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

The rule creates three distinct categories of involuntary dismissals. The first category includes cases of the plaintiff's failure to prosecute or to comply with the rules of procedure or a court order. The rule states that these dismissals, unless otherwise specified by the courts, operate as adjudications on the merits. Courts in this circuit have given these types of dismissals preclusive effect because the plaintiff has, in effect, abused his opportunity for a full and fair litigation and, thus, has forfeited the right to pursue his claim.[2]

These first-category dismissals "primarily involve situations in which the defendant must incur the inconvenience of preparing to meet the merits because there is no initial bar to the Court's reaching them." *Costello v. United States*, 365 U.S. 265, 286 (1961). Thus, logic dictates that a subsequent action should be barred following such a dismissal. *Id.*

The second category of dismissals includes dismissals for lack of jurisdiction, for improper venue, or for failure to join a party as specified by FED. R. CIV. P. 19. These dismissals are not considered adjudications on the merits and ordinarily do not, and should not, preclude a party from later litigating the same claim, provided that the specific defect has been corrected. *See* 18 WRIGHT ET AL., § 4436, at 338 (stating that "a dismissal for

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2. *See, e.g., Anthony*, 617 F.2d at 1168-69 (dismissal for failure to prosecute); *In re Reed*, 861 F.2d 1381, 1382-83 (5th Cir. 1988) (holding that dismissal for failure to comply with discovery orders is on the merits); *Dillard v. Security Pac. Brokers, Inc.*, 835 F.2d 607, 608 (5th Cir. 1988), *cert. denied*, 113 S. Ct. 1046 (1993) (holding that dismissal for failure to appear at a deposition is on the merits); *Truck Treads, Inc. v. Armstrong Rubber Co.*, 129 F.R.D. 143, 147 (W.D. Tex. 1988), *aff'd as modified*, 868 F.2d 1472 (5th Cir. 1989) (dismissal for failure to comply with discovery rules treated as on the merits).

lack of jurisdiction or improper venue does not operate as an adjudication upon the merits") (footnote omitted). Such a dismissal should, however, preclude relitigation of the specific issue of jurisdiction, venue, or joinder already resolved. *See id.* § 4435, at 334.

The third category of dismissals encompasses dismissals "not provided for in this rule." This includes, for example, dismissal for a plaintiff's failure to comply with a federal rule, as provided for in the first sentence of rule 41(b), but on the court's own motion. Moreover, the dismissal in this case — on f.n.c. grounds — is also a dismissal not provided for in rule 41. According to a leading treatise, this provision in rule 41(b) "has caused substantial difficulty," as "[t]here are many grounds of dismissal that do not seem to fall within the categories 'provided for in this rule' and yet clearly should not — and do not — operate as an adjudication that precludes a second action on the same claim." *See* 18 WRIGHT ET AL., *supra*, § 4435, at 333-34.

In *Costello*, the Court announced several general principles regarding rule 41(b) that now inform our analysis. *Costello* involved a denaturalization proceeding in which the government failed to file a good-cause affidavit that was a prerequisite to any proceeding in which the government sought to revoke citizenship. The district court dismissed the first proceeding for failure to file the affidavit but did not specify whether the dismissal was with prejudice. The defendant argued that the dismissal was "on the merits" and, therefore, barred the government from attempting a second revocation.

The Court held that the dismissal was for "lack of jurisdiction" under rule 41(b). 365 U.S. at 285. As a result, the

government could pursue the second proceeding. The Court expressly held that the "lack of jurisdiction" exception was not limited to "the fundamental jurisdictional defects which render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter." *Id.* Instead, the Court broadened the exception to cover "those dismissals which are based upon a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim." *Id.* Thus, the failure to file the affidavit was encompassed by the lack-of-jurisdiction exception.[3]

As noted above, the Court went on to say that the first-category dismissals reflect a policy whereby defendants should not be forced to suffer from a plaintiff's misstep once they have had to incur the inconvenience of preparing to meet the merits of the case. *Id.* at 286. Moreover, the Court found that situations involving third-category dismissals "not provided for in this rule" should operate as adjudications on the merits only where the policy supporting first-category dismissals is "equally applicable." *Id.* For example, if a court dismisses a case *sua sponte* for the plaintiff's failure to comply with an order, the dismissal should be regarded as on the merits. *Id.* at 287.

IV.

While *Costello* did not specifically address the issue of a dismissal on f.n.c. grounds, we will not give the instant dismissal preclusive effect, even in light of the "with prejudice" designation, in this case. Using the principles announced in *Costello*, and considering the basic nature of the f.n.c. doctrine,

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3. For criticism of *Costello*, *see* 18 WRIGHT ET AL., *supra*, § 4435, at 334-336 (calling the Court's interpretation "directly objectionable because it involves so slippery a method of manipulating the concept of jurisdiction").

we cannot regard such an f.n.c. dismissal as "on the merits" for res judicata purposes as to the entire claim.

Arguably, an f.n.c. dismissal falls under the Court's expansive definition of the "lack of jurisdiction" language in rule 41(b). A convenient forum could be regarded as a "precondition requisite to the Court's going forward to determine the merits" of the claim. *Id.* at 285.[4]

Strictly speaking, however, f.n.c. is not a refusal to hear a case for "lack of jurisdiction" as stated in rule 41(b); it is a discretionary refusal to exercise jurisdiction that plainly does exist. While f.n.c. is not a "jurisdictional" concept, an f.n.c. dismissal follows "the same rules" as a dismissal for lack of jurisdiction or improper venue. *See* 18 WRIGHT ET AL., *supra*, § 4436, at 339. Moreover, such an f.n.c. dismissal, like a dismissal for lack of jurisdiction or improper venue, "does not establish claim preclusion"; it can work to preclude the relitigation only of the f.n.c. issue in that court. *Id.* at 346. *Accord Mizokami Bros. v. Mobay Chem. Corp.*, 660 F.2d 712, 715-17 (8th Cir. 1981).

An f.n.c. dismissal is a "deliberate refusal[] to decide the substantive issues presented" because the court was mistakenly

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4. The Court's recent pronouncement in *American Dredging* suggests that an f.n.c. dismissal might fall under the "improper venue" provision of 41(b). Although the Court was not interpreting 41(b), it stated that f.n.c. "is nothing more or less than a supervening venue provision." 114 S. Ct. at 988.

Because the Court was not interpreting 41(b), and because of the longstanding distinction between a 28 U.S.C. § 1404(a) f.n.c. transfer and an improper forum, *see, e.g., Tel-Phonic Servs. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1141 (5th Cir. 1992), we treat an f.n.c. dismissal as distinct from an "improper venue" dismissal.

chosen. *See* 18 WRIGHT ET AL., *supra*, § 4436, at 347. Furthermore, "[n]o apparent reason exists to justify forfeiture of the underlying claims upon a mistaken choice of tribunal," *id.*, as the f.n.c. determination generally is made well before a court begins to address the merits of a claim.

For this latter reason, our decision is perfectly consistent with *Costello*. An f.n.c. dismissal is more akin to an initial bar to a court's decision on the substance of a claim than to a situation in which the defendant has first incurred the inconvenience of preparing to meet the merits of the case. *See Costello*, 365 U.S. at 286. Thus, under *Costello*'s formulation, an f.n.c ruling is the type of rule 41(b) dismissal that is "not provided for" in the rule but nevertheless does not operate as an adjudication "on the merits" of the entire claim.[5]

We reconcile our decision in this case with the language of rule 41(b) by noting that the f.n.c. dismissal does carry some preclusive effect and is, in fact, "on the merits" as provided for in the rule: It is an adjudication "on the merits" of the f.n.c. issue itself. The plaintiffs' attempt to litigate their claims in a federal court in Texas was dismissed "with prejudice" insofar as they chose a federal court in Texas as their forum. It would be unwarranted to hold further that this judgment constitutes

5. *Weissinger v. United States*, 423 F.2d 795 (5th Cir. 1970) (en banc), is not controlling here, as it involved an interpretation of three sentences in rule 41(b) that since have been deleted. Those provisions allowed for a directed verdict in non-jury cases. At that time, FED. R. CIV. P. 50 covered only jury trials. Thus, the rule 41(b) dismissal in *Weissinger* was made after a "full-blown trial" and following "lengthy and careful findings of fact and conclusions of law." 423 F.2d at 798. *Weissinger* entailed, at that time, a dismissal that, in effect, fell under what we earlier have referred to as the first category of dismissals. Thus, both *Weissinger* and our holding today are consistent with *Costello*.

the basis for an injunction against a separate, state court proceeding.

The Supreme Court has held that a federal ruling on the f.n.c. issue does not serve to bind a state court, even in the same state. In the case at issue, a Texas federal court had dismissed without prejudice on f.n.c. grounds. The plaintiff then attempted to file suit in Texas state court. This court upheld an injunction against the state proceeding. *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), *rev'd*, 486 U.S. 140 (1988). In reversing, the Court noted that "whether the Texas state courts are an appropriate forum for petitioner's Singapore law claims has not yet been litigated, and an injunction to foreclose consideration of that issue is not within the relitigation exception." 486 U.S. at 149. Thus, the only issue that the federal district court had decided was whether the claims should be dismissed under the *federal* f.n.c. doctrine. *Id.* at 148.

The instant case and *Chick Kam Choo* are similar, with the exception that in the present case the dismissal was designated as "with prejudice."[6] Functionally, however, these two cases are equivalent.[7] The dismissal in both cases was made because the

6. We note that the words "with prejudice" and "without prejudice" are not used in rule 41.

7. The district court, which entered both the dismissal on f.n.c. grounds and the order that is now appealed, indicated in that latter order that because Louisiana does not recognize the principle of f.n.c., "no conduct [by plaintiffs] is exposed that violates this court's final judgment." Moreover, the court referred to the earlier final judgment as "addressing the forum non conveniens issue." Plainly, the court never contemplated that its dismissal "with prejudice" was as to plaintiffs' claims, as opposed to the f.n.c. issue only. Thus, plaintiffs' attorneys here are saved from their failure timely to appeal the "with prejudice" ruling.

plaintiffs had chosen a forum that, while proper, was "inconvenient." As noted above, the limited nature of the f.n.c. ruling cannot serve to bar the plaintiffs' claims forever from U.S. courts.[8]

V.

Plaintiffs' tactics in manipulating fora in this case are "repugnant," as the district court properly observed, but they are permitted by the law that we must follow. Certainly, defendants contemplated that they would be subject only to a suit in the Philippines following the f.n.c. dismissal. The State of Louisiana is free, however, to formulate its laws as it sees fit within the bounds of the Constitution. Under *Chick Kam Choo*, it is Louisiana's prerogative to choose not to recognize the doctrine of f.n.c. in its own courts. It would be improper for this court to preclude plaintiffs from pursuing their claims in Louisiana state court based solely upon a prior federal court dismissal on f.n.c. grounds.

Accordingly, the judgment of the district court, refusing to issue an injunction, is AFFIRMED.

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8. Thus, contrary to defendants' argument, the issue-preclusive and "law of the case" effects of the f.n.c. ruling in this case cannot extend to state court.

Appendix G

EMILIO M. GARZA, Circuit Judge, with whom SMITH, Circuit Judge, and STAGG,[9] District Judge, join, specially concurring:

After a careful and searching review of both the record and the relevant case law, I conclude that I must concur in the majority opinion. I write separately to emphasize this Court's disdain for the tactics employed in this case. During this litigation, the plaintiffs' attorneys hid the ball, the defendants' attorneys dropped the ball, and the courts were left holding the bag.

One year prior to filing suit in Texas state court, plaintiffs filed an essentially identical suit in Louisiana state court, with instructions to "please withhold service at this time." The Louisiana suit was apparently a back-up suit, designed to ensure that plaintiffs would have a forum for their claims in the United States in the event they were unable to maintain their suit in Texas. To protect the Louisiana suit from interference, the plaintiffs made no statements concerning the lawsuit's existence, keeping the suit "secret" until 1991. Only after we remanded the case in *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540 (5th Cir.), *cert. denied*, 502 U.S. 963, 112 S. Ct. 430, 116 L. Ed. 2d 449 (1991) (*"Baris I"*) did the plaintiffs raise the possibility of the Louisiana suit being affected by the proceedings in Texas federal court, and then only in passing. Had the district court been fully aware of the contents of the Louisiana suit, it may have ruled differently. Instead, the plaintiffs continued their charade, imploring this Court and the district court to make sure they had an adequate and available foreign forum before dismissing their Texas action. The federal courts dutifully adjudicated this issue, and the district court ultimately required the defendants to be amenable to suit in the Philippines.

9. Judge Stagg reluctantly joins the special concurrence. He is of the opinion that the underlying case should be tried in the Philippines and nowhere else.

Having successfully hidden the Louisiana suit, however, plaintiffs are now allowed to pursue essentially the same claims in both Louisiana and the Philippines, and the defendants have no defense against being subjected to suit in both places. We find plaintiffs' manipulation of fora in this case deplorable. We expect attorneys, as officers of the court, to be more forthright in their actions before the courts. Instead, these attorneys chose to manipulate the courts, wasting our valuable time and energy.[10]

The defendants, however, are not blameless here either. According to the record, at least some of the defendants discovered the Louisiana suit as early as 1990. In 1991, we, without knowing the contents of the Louisiana suit, mentioned it in a footnote in *Baris I. Baris I,* 932 F.2d at 1549 n.13. Further, the plaintiffs gave the suit cursory treatment in their brief to the district court before its second dismissal for *forum non conveniens.* Yet at no time prior to seeking this injunction did the defendants specifically raise the issue of the Louisiana suit before the district court. It is true that Caltex was not served until 1993, but they were aware of the suit in 1991 at the latest, prior to the district court's second *forum non conveniens* dismissal. The defendants should have brought the suit to the attention of the district court. Whether their decision to remain silent was an oversight or a miscalculated tactical decision we do not know. The result however, is that the defendants are now subject to suit in both Louisiana and the Philippines, and much judicial time and energy have been wasted.

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10. Further, we note that once the defendants filed their petition to remove the Texas suit to federal court, the plaintiffs neglected to move to remand within thirty days. As a consequence, we concluded that the district court had jurisdiction, without having to decide whether a Death on the High Seas Act claim is removable. *See Baris v. Sulpicio Lines, Inc.,* 932 F.2d 1540, 1543 & n.3 (5th Cir.), *cert. denied,* 502 U.S. 963 (1991) (*"Baris I"*).

Appendix G

The district court did not have sufficient information necessary to make a proper ruling in the Texas litigation. It is the lawyers' responsibility to supply the courts with this information. Without such forthrightness, justice suffers. It did so here.

APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MARCH 14, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20498

VICTOR C. BARIS, ET AL.,
Plaintiffs-Appellees,

versus

SULPICIO LINES, INC., ET AL.,
Defendants,

CALTEX PETROLEUM, INC., ET AL.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion January 23, 1996, 5 Cir., 1996, __ F.3d __)

(March 14, 1996)

Before POLITZ, Chief Judge, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHÉ, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges.*

* Judge King is recused and did not participate in this decision.

Appendix H

BY THE COURT:

A member of the court in active service having requested a poll on the suggestion for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.